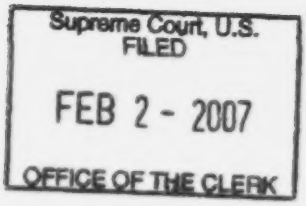

UNITED STATES SUPREME COURT

06-921

MOSTAFA REYAD,
PETITIONER

V.

BANK OF NEW YORK, TRUSTEE,
RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent states that the question presented for review by the Petitioner regarding the constitutionality of CGS 52-221(a) was never raised in the trial court and cannot form the basis of the Petition.

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CITATIONS OF REPORTS

Bank of New York v. National Funding 97 Conn. App. 133 (2006) and underlying trial court opinion, unreported.

BASIS FOR JURISDICTION

Respondent contends that there is no basis for jurisdiction because no federal question has been raised and there has been no compliance with Rule 10. Under Rule 10, review of a case by petition for certiorari is a matter of discretion for the Court and is not a matter of right. A petitioner is required to demonstrate compelling reasons to obtain review by petition for certiorari. The enumerated grounds include: (1) decisions in conflict with the federal courts of appeal; (2) a state court of last resort has improperly decided an important federal question; (3) a state or federal court has decided a federal question which needs to be settled by this Court. None of these grounds are satisfied in this case, as it involves questions of Connecticut law. In addition, no arguments were ever advanced in the trial court which addressed any federal questions.

The Connecticut Supreme Court declined to exercise its discretion to review the Appellate Court's decision, which is a clear indication that Reyad's arguments are without merit. The issues involved in this case are

purely matters of substantive and procedural Connecticut law. Reyad never raised any questions of federal law during the trial of this case, and the lengthy bench opinion addresses all of the arguments which were advanced by the Petitioner, including but not limited to standing.

STATEMENT OF THE CASE

The Connecticut Superior Court entered a judgment in favor of the Respondent, Bank of New York, Trustee [BNY], on January 21, 2005, after a hearing in damages. Petitioner, Mostafa Reyad, d/b/a National Funding ["Reyad"], was defaulted for his failure to comply with discovery requests issued by BNY. Reyad failed to file a timely notice of defenses within 10 days of the entry of the default, as required under Connecticut Practice Book Section 17- 35(b). At the hearing in damages, the Defendant-Appellant offered no evidence regarding damages or challenging damages, although he had the right to do so. [Transcript of October 26, 2004, p.79].

On August 15, 2006, the Connecticut Appellate Court affirmed the trial court judgment, as reported in 97 Conn. App. 133 (2006). Reyad filed a Motion for Reconsideration, En Banc, dated August 15, 2006, which was denied by the Connecticut Appellate Court on September 6, 2006. A Petition for Certification was filed by the Defendant-Appellant, Mostafa Reyad, according to date stamp of September 14, 2006, which was denied by the Connecticut Supreme Court. Therefore, all state law procedural avenues were unsuccessfully explored by Reyad, including a motion to stay enforcement of the judgment after the Connecticut Supreme Court denied the Petition for Certification.

SUMMARY OF THE ARGUMENT

I. Background of Petitioner's Business as Relates to Case.

II. Factual Background and Findings of Trial Court.

III. Legal Basis for State Court Decision.

THE ARGUMENT

I. BACKGROUND OF PETITIONER'S BUSINESS AS RELATES TO CASE.

Reyad operated a series of mortgage companies under various trade names in Connecticut, including National Funding. Reyad utilized third party funds to close mortgage loan transactions, under which he earned yield spread premiums and various commissions. All of the loans closed by Reyad were immediately sold, so Reyad effectively held no mortgage loans and did not fund any of the mortgage loans from which he earned commissions. The Connecticut District Court, in a separate case, has made findings of fact and conclusions of law that Reyad converted or misappropriated money under certain warehouse lines of credit, which findings are the basis of a federal court judgment against Reyad for a separate violation of the Connecticut unfair trade practices act. IndyMac v. Reyad, 2006 U.S. Dist. Conn. Lexis 55272. Reyad, as a licensee under Connecticut law as a non-depository first and second mortgage lender under CGS 36a-488, has a non-delegable duty to comply with Connecticut and federal law. Cornelius v. Department of Banking, 94 Conn. App. 547 (2006).

II. FACTUAL BACKGROUND AND FINDINGS OF TRIAL COURT.

Plaintiff-Appellee, Bank of New York, Trustee ("BNY"), commenced this action for negligence and an unfair trade practice by Writ, Summons and Complaint dated August 1, 2000 against the Defendants Mostafa Reyad, National Funding, National Funding Mortgage Banker, Mostafa Reyad & Companies, ("Reyad Defendants"), for damages in connection with the origination of two mortgage loans in the original principal amount of $1.65 million dated August 31, 1998 to Eugene Chimblo, ostensibly secured by certain real property known as 993 Lake Avenue, Greenwich, Connecticut ("premises"). Counsel filed an appearance for the Reyad Defendants at the inception of the action. On or about July 23, 2002, in response to a request to revise filed by a defendant, BNY filed a Revised Complaint, and an Answer was filed by the Reyad Defendants dated August 16, 2002, which Answer admitted that the loan officer in these transactions was an employee of Reyad.

BNY served discovery requests upon the Reyad in September, 2003. Reyad failed to comply with the discovery requests. BNY filed a motion for compliance (#154.00) on December 3, 2002, which was granted by the Court, and compliance was ordered. No such compliance occurred, and BNY proceeded to file a Motion for Default dated February 9, 2004, which was granted by the Court on May 6, 2004. Notice of the default was is-

sued by the clerk on May 6, 2004. On or about May 13, 2004, Defendant-Reyad filed a Motion to Reopen the default, which Motion was scheduled for oral argument before the Court on July 12, 2004.

After oral argument, the trial court denied Reyad's Motion to Reopen, and the case was assigned to a hearing in damages. On or about July 20, 2004, the Defendant, Reyad, filed a notice of defenses. The notice of defenses were untimely under P.B. Section 17-35 (b), in that it was not filed within 10 days of the order from the clerk that the default was granted, which was May 6, 2004. Accordingly, based upon the absence of a timely disclosure of defense, Reyad was precluded from challenging any aspects of liability in this case. In addition, Reyad failed to disclose any experts on liability or damages at any time during the pendency of the case.

At the hearing in damages on October 26, 2004, Reyad offered no evidence to challenge damages. Reyad offered no expert or other testimony on the value of the collateral, nor did he offer any evidence to challenge the amount of the claimed damages. The following exchange occurred on the record with the Defendant-Reyad (transcript of October 26, 2004, p. 79):

> The Court: Do you wish to put on any case ?
>
> Mr. Reyad: in evidence ?
>
> The Court: With regard to damages.
>
> Mr. Reyad: For the damage. No evidence for the damage.
>
> The Court: Okay, sir. Thank you.

BNY asked the Court to take judicial notice of the mortgage foreclosure action, under which title vested on February 1, 2002 and a deficiency judgment entered on June 16, 2003 for $448,726.50 (Plaintiff's exhibit "4"). The trial court took judicial notice of these findings from the mortgage foreclosure action. BNY introduced evidence that a loan officer for the Respondent permitted an appraisal, prepared for the seller of the premises, to be "re-certified" to the Respondent as the appraisal which valued the collateral for the loan transaction. (Plaintiff's exhibit 1). The appraisal report, prepared by Gary Olcha, indicated a value of $2.75 million. Plaintiff, in a separate action, obtained a judgment against that appraiser, which judgment was admitted into evidence based upon a finding of judicial notice (p. 76, transcript of 10/26/04).

BNY offered testimony from its expert that the loan to value ratio for the subject transaction was about 120%, not the 60% loan to value ratio as required under the loan program at issue. The evidence showed at the time of the loan origination that the reported 55 - 60% loan to value ratios by the Reyad Defendants in the commitment letter and the Uniform Underwriting Transmittal Summary were false. (Plaintiff's exhibits 7 and 8). The Plaintiff's expert further testified that he had appraised the subject property on a number of occasions and was familiar with the Greenwich real estate market. Valuation testimony was offered both from the time of the origination of the loan in 1998 and on the date title

vested in the foreclosure of the mortgage on February 1, 2002.

The evidence demonstrated that the value of the property at the time of the origination of the loan was $1.25 million, not the $2.75 million as set forth by the Respondent in the Uniform Underwriting Transmittal Summary (Plaintiff's exhibit "8"). The trial court further found that the Respondent possessed information regarding large disparities in the collateral value- an auction price of $875,000 and an appraisal at $2.75 million- yet they proceeded to process the loan documentation and close the loan transaction with funds from a third party, then selling the loan documents to the Plaintiff.

The trial court specifically addressed the issue of standing in that it held that Reyad's assertion that he had no dealings with BNY was directly contradicted by his very own testimony in the mortgage foreclosure action, in which he testified that he authorized the assignment of the loan documents to BNY.

The trial court entered damages against the Respondent for the amount of the deficiency judgment, plus an award under the Connecticut Unfair Trade Practices Act for punitive damages equal to the deficiency judgment, for a total award of $897,453. In short, the trial court found that Reyad, acting through his loan officer, engaged in deceptive conduct to earn a commission by obtaining an inaccurate appraisal and by failing to alert the funds provider to information within its possession

regarding the inflated valuation. This evidence formed the basis of a finding that an unfair trade practice occurred.

Mortgage fraud perpetuated by mortgage brokers has become a national epidemic. Alarmingly, the FBI's 2005 Financial Institutions Report concludes that 80 per cent of all mortgage fraud involves "industry insiders" [i.e. appraisers, mortgage brokers, closing agents]. This Court may take judicial notice of HR 1295, currently pending before Congress, which is designed to address the national mortgage fraud epidemic.

III. LEGAL BASIS FOR STATE COURT DECISION.

The Connecticut Superior and Appellate Courts decided this case consistent with prior Connecticut case precedent, that the failure to file a timely notice of defenses constitutes a waiver of any defense to liability under Connecticut law. Schwartz v. Milazzo, 84 Conn. App. 175 (2004).

"A default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant." (Internal quotation marks omitted.) Schwartz v. Milazzo, 84 Conn. App. 175, 178, cert. denied, 271 Conn. 942, (2004). The defaulted party may challenge the allegations of a complaint only if it files a notice of defenses within ten days of notice of the default, which the defendants here failed to do. See General Statutes § 52-221 (a); Practice Book §§ 17-34, 17-35; Catalina v. Nicolelli, 90 Conn. App. 219, 222-24, (2005).

Defendant-Appellant has cited no public policy which is greater than the protection of the public by deterring licensees from misbehavior in the mortgage loan origination process. In addition, loans tainted with fraud are properly the subject of breach of contract and other claims against loan originators. Mario Valentin v. Community Remodeling Co., 90 Conn. App. 255 (2005). Any possible doubt about the good faith of Reyad may be quickly dispelled by a federal court judgment in a separate case, which entered punitive damages against him for intentional misconduct in abusing warehouse lending monies which were to fund mortgage loans. IndyMac v.

Reyad, 2006 U.S. Dist. Conn. Lexis 55272. According to well-established Connecticut law, a plaintiff who challenges the constitutionality of a statute must prove that the statute has adversely affected a constitutionally protected right "under the facts of his particular case and not merely under some possible or hypothetical set of facts not proven to exist." Hardware Mutual Casualty Co. v. Premo, 153 Conn. 465, 471, (1966); State v. Cuvelier, 175 Conn. 100, 111-12, (1978); Gentile v. Altermatt, 169 Conn. 267, 307, (1975), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976); Kellems v. Brown, 163 Conn. 478, 483, appeal dismissed, 409 U.S. 1099, 93 S. Ct. 911, 34 L. Ed. 2d 678 (1972); Adams v. Rubinow, 157 Conn. 150, 152-53 (1968). Furthermore, a person contesting a statute's constitutionality has a heavy burden to establish its invalidity beyond a reasonable doubt. Weil v. Miller, 185 Conn. 495, 501-502 (Conn. 1981) In this case, Reyad never challenged the constitutionality of CGS 52-221(a) prior to the instant petition, nor has he identified how the statute has adversely affected a constitutionally protected right. The simple reality is Reyad failed to follow Connecticut procedure, yet he was still afforded notice of a hearing to open the default, and a separate hearing, with appropriate notice, on the issue of damages.

Finally, Reyad testified in the mortgage foreclosure that he specifically authorized the assignment of the subject loans to the Respondent. The trial court in the

instant case noted that his protestations and testimony to the contrary were totally lacking in credibility. Ample of evidence of standing exists, as more fully set forth in the trial court opinion, which is incorporated by reference.

CONCLUSION

WHEREFORE, the Objection to the Petition for Certioari should be sustained.

The Respondent, Bank of New York, Trustee

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CERTIFICATION

I hereby certify that a copy of this pleading was mailed by us mail, postage prepaid, on this 2nd day of February, 2007, to the following counsel and pro se parties of record:

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Geoffrey K. Milne